

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

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In re:	Chapter 11
WASHINGTON MUTUAL, INC., <i>et al.</i> ¹	Case No. 08-12229 (MFW)
Debtors.	Jointly Administered
-----x	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	Civil Action No. 1:09-cv-615-GMS
and	Bk. Adv. No. 09-50551; 09-50934
FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF WASHINGTON MUTUAL BANK,	
Appellants,	
v.	
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	
Appellees.	
-----x	

APPENDIX TO ANSWERING BRIEF OF APPELLEE DEBTORS

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October 19, 2009

¹ The Debtors in these Chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (i) Washington Mutual, Inc. (3725) and (ii) WMI Investment Corp. (5395). The Debtors continue to share their principal offices with the employees of JPMorgan Chase located at 1301 Second Avenue, Seattle, Washington 98101.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
WASHINGTON MUTUAL, INC., et al., Case No. 08-12229 (MFW)
Debtors. (Jointly Administered)
Sept. 25, 2009 (10:32 a.m.)
(Wilmington)
JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION,
Plaintiff,
vs. Adv. Pro. No. 09-50551 (MFW)
WASHINGTON MUTUAL, INC., and
WMI INVESTMENT CORP.,
Defendant for All Claims,
-and-
FEDERAL DEPOSIT INSURANCE
CORPORATION,
Additional Defendant
For Interpleader Claim
WASHINGTON MUTUAL, INC., and
WMI INVESTMENT CORP.,
Plaintiffs,
vs. Adv. Pro. No. 09-50934 (MFW)
JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION,
Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

Appearances:

For the Debtors: Brian S. Rosen, Esq.
Richards, Layton & Finger
David Elsberg, Esq.
Quinn Emanuel

For JPMorgan Chase: Robert Sachs, Esq.
Sullivan & Cromwell
Adam Landis, Esq.
Landis, Rath & Cobb

For the Unsecured Creditors Committee: Lawrence Shiekman, Esq.
Pepper Hamilton

In *Propria Persona*: Stephen E. Whittaker, Esq.
Stephen E. Whittaker

For Certain Plan Participants: Laurie Krepto, Esq.
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Proceedings recorded by electronic sound recording;
transcript produced by transcription service

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1 THE COURT: Good morning.

2 MR. ROSEN: Good morning, Your Honor, and I'm going
3 to get it right this time even though it's a different case.
4 Brian Rosen, Weil, Gotshal & Manges on behalf of Washington
5 Mutual, Inc., and with me today is Mr. Mark Collins from
6 Richards, Layton & Finger.

7 THE COURT: Alright.

8 MR. ROSEN: Thank you, Your Honor. We have a few
9 matters on the agenda this morning, and as we alerted the
10 Court, based upon an extraneous circumstance, travel, we
11 would like to just switch the order in which we are going to
12 be doing them. So, the first item we would like to take up,
13 Your Honor, would be the additional item, which is the notice
14 of divestiture, and with was the JPMorgan request to talk to
15 the Court.

16 THE COURT: Okay.

17 MR. SACHS: Yes, I'm up, Your Honor. Good morning.
18 Robert Sachs from Sullivan & Cromwell on behalf of JPMorgan
19 Chase. Your Honor, we have filed a notice before the Court
20 because we don't believe that this is a matter that requires
21 a decision but simply given the parties have a disagreement
22 on the issue, an indication from the Court that it is
23 divested of jurisdiction while the appeal is pending from
24 Your Honor's orders denying the FDIC's and JPMorgan Chase's
25 motions to dismiss and to stay the adversary proceedings

1 under the exclusive claims process under FIRREA. We are
2 taken to task in the opposition for delaying in bringing this
3 to Your Honor. For that I apologize. We, frankly, did not
4 focus on this at the time of the first matter following the
5 initial appeal. We did focus upon it, and when we focused it
6 upon it brought it immediately to Your Honor's attention. I
7 would note, however, that subject matter jurisdiction of
8 which this is, is not waive-able and it is all parties'
9 responsibility to alert the Court when there are questions
10 about the Court's subject matter jurisdiction, and that's
11 what this is. The rule that is applicable is very
12 straightforward, though there's obviously a fundamental
13 dispute as to its application here. The filing of a notice
14 of appeal divests the Court of jurisdiction over all matters
15 that are encompassed by the appeal. In this case, we and the
16 FDIC both filed timely notices of appeal. There's no dispute
17 among the parties. One of the few matters that's not
18 disputed is that all the matters encompassed by these
19 adversary proceedings are in fact encompassed by the appeal.
20 So if the rule were applicable, it would encompass the entire
21 adversary proceedings pending either the dismissal of the
22 appeals or their disposition by the District Court and/or the
23 Third Circuit, in this case. There's an exception to this
24 rule. It's a specific exception and the controlling Third
25 Circuit case is Lepo, and it says, "You don't have to honor

1 the divestiture of jurisdiction. There is no divestiture."

2 It's not an honor, there is no divestiture of jurisdiction in

3 a situation where the Court finds by specific written factual

4 findings that an appeal is frivolous. That is the exception

5 to that rule.

6 THE COURT: Well, except in bankruptcy cases, the

7 case can proceed while only the matter that is on appeal is -

8 MR. SACHS: We're not suggesting that the Court is

9 divested of jurisdiction over the bankruptcy case. We're

10 discussing specifically the adversary proceedings, which are

11 adjudicated proceedings between parties. So in this

12 particular case we're dealing only with those. Your Honor

13 has complete jurisdiction to continue to adjudicate this

14 bankruptcy. The issue that you do not have jurisdiction,

15 given the pendency of the appeal, and we've cited bankruptcy

16 cases and adversary proceedings to that effect. Sacred

17 Heart, for example, is one, and there are numerous other ones

18 cited in our - which is a case that went up in Pennsylvania

19 and was affirmed by the Third Circuit, is one involving

20 adversary proceedings. It doesn't matter whether the case is

21 pending before the Bankruptcy Court or the District Court,

22 the application of the rule is the same. It doesn't apply to

23 your case.

24 THE COURT: Does it apply where an appeal is taken

25 of a motion to dismiss the adversary? Is that interlocutory?

1 MR. SACHS: No, it is a collateral order appeal,
2 Your Honor, and I'm going to address that very specifically
3 right now. Specifically, the rule is, it does apply to
4 collateral order appeals and the cases we have cited to you
5 do involve collateral order appeals. The Sacred Heart case,
6 for example, is a collateral order appeal. Lepo is a
7 collateral order appeal. The Supreme Court has found in
8 these cases and the Third Circuit multiple times has found
9 that the same rule applies when you're dealing with a
10 collateral order appeal as it applies to an appeal from a
11 final judgment. Indeed, that's what the whole dispute is
12 about, that's what all these cases exist to find, and indeed,
13 Your Honor, courts have found that actions taken by a
14 district court after divestiture of jurisdiction during a
15 collateral order of appeal are nullities, and even where they
16 uphold the Court below, they rule that the actions taken have
17 to be undone even though it's almost a - it's silly in a
18 sense, because the case is going to proceed, but that's the
19 rule. That's what the Tenth Circuit found in the Stewart
20 case, for example, Your Honor, that we cited to you. But,
21 Your Honor, the rule is applicable to collateral order
22 appeals for all matters encompassed within the appeal, and
23 the distinction, I would say, between a final appeal and a
24 collateral order appeal is obviously a final appeal
25 encompasses the entire case. In some cases a collateral

1 order appeal might not encompass the entire case, it's
2 conceivable, but in this case there is no dispute it
3 encompasses the entire case here. So, looking here at this,
4 there is a controlling case in the Third Circuit, Your Honor,
5 on this issue, and that is the Praxis case, and surprisingly
6 enough, the debtors do not cite to Your Honor, they do not
7 cite, they do not address the Praxis case in any way, shape,
8 or form. They give you a generalized argument about why this
9 should not be considered a collateral order appeal, and I
10 would suggest, first of all, they're arguing about the merits
11 not whether our collateral appeal is frivolous, which is the
12 only inquiry here, whether you agree or disagree as to how
13 that should come out. But in this case, Praxis, a Third
14 Circuit case, has already determined that appeals given
15 FIRREA's importance, the collateral appeals from a refusal to
16 abide by FIRREA's mandatory terms are properly treated as a
17 collateral order. It's not even mentioned, distinguished, or
18 referenced in any way, shape, or form in the brief filed by
19 the debtors, but it's dispositive here as to whether this is
20 a proper collateral order appeal, but it's at least
21 dispositive as to whether we have a good faith basis to take
22 a collateral order appeal and therefore is inconsistent with
23 any finding that our appeal is in bad faith, taken
24 objectively, frivolous, no reasonable lawyer could believe we
25 have a basis for filing a collateral order appeal, et cetera,

1 which is the scope of the Court's inquiry here. Praxis, the
2 Third Circuit stresses the importance of FIRREA, and I would
3 add that there's a Tenth Circuit case that comes to exactly
4 the same conclusion as Praxis, the Mark Development case. We
5 didn't cite it to Your Honor. Didn't think it was necessary
6 given citing Praxis from the Third Circuit, but the Tenth
7 Circuit, 992 F2d 1503 comes to the same conclusion about the
8 importance of FIRREA in taking a collateral order appeal from
9 a refusal to abide by the mandatory terms of FIRREA. Now, we
10 understand Your Honor disagrees with us on the underlying
11 merits -

12 THE COURT: Yes.

13 MR. SACHS: - and I'll address those in a minute. I
14 don't believe Your Honor would conclude that our position on
15 that is frivolous. You may disagree, and we respectfully
16 disagree with the conclusion that you reached, but that's
17 litigation. Sometimes you win and sometimes you lose, and
18 courts agree with you sometimes and they disagree with you
19 other times, but that doesn't mean that we are frivolous in
20 advocating our client's position and indeed the FDIC's
21 position that this matter is properly subject to FIRREA and
22 that FIRREA does apply to claims against third party buyers
23 from the receiver that involve the assets of the receivership
24 estate or the actions of the receiver, which the claims here,
25 in our view, do.

1 THE COURT: Have you filed a notice for leave to
2 appeal or do you feel that the notice of appeal is
3 sufficient?

4 MR. SACHS: We filed both. We filed a notice of
5 appeal of right as a collateral appeal. We have
6 alternatively sought leave to appeal. So, the notice of
7 appeal in this case is the act that divests the Court of
8 jurisdiction. We understand the Court of Appeal, or in this
9 case, the District Court could disagree with us on that
10 issue, but our position is not frivolous. This isn't a case,
11 like many of the ones they cite that say a notice of appeal
12 is a nullity where they cite a case where you have to appeal
13 within 30 days and the appeal is filed in 50 days.
14 Objectively, that's a nullity or where you cannot appeal
15 until after something happens and they appeal at a different
16 point in time or they forget to file the appeal or they file
17 the wrong paper, objective acts. The claim here, this is a
18 subjective issue. Does this appeal fit within the collateral
19 order appeal doctrine? If it does, this Court is divested of
20 jurisdiction to entertain matters encompassed by the appeal
21 pending that adjudication, and as I said, the sole issue for
22 this Court is, Is our filing of a notice of appeal under the
23 collateral order doctrine frivolous? Not that you disagree
24 with it, not how you would decide it, not how some other
25 court would, but is it frivolous, and if you look at Praxis,

1 the importance that the Third Circuit ascribes to FIRREA and
2 that was a collateral appeal, Your Honor of far less
3 significance than this one. That was one as to whether the
4 receiver, in that case the RTC as opposed to the FDIC, was
5 entitled to a 90-day stay as opposed to only the 45-day stay
6 that the Court granted to it, and the Third Circuit went
7 through the critical importance of FIRREA's comprehensive
8 claims process, identified FIRREA as the most sweeping thrift
9 reform legislation in the nation's history, identified the
10 cost and importance of litigation claim handling to the
11 FIRREA comprehensive scheme, and the expressed limits imposed
12 upon parties in attempting to circumvent the exclusive claims
13 process. That's precisely what this appeal involves. Again,
14 the substance of that is not before us now. You've already
15 ruled against us on that. I don't expect you to agree with
16 me today, but the question of whether we can appeal it is one
17 that Praxis makes very clear that in the Third Circuit this
18 is properly the subject of a collateral order of appeal and
19 the filing of that document divests the Court of
20 jurisdiction. That's not a surprising result, Your Honor.
21 The debtors cite a lot of Supreme Court cases going into the
22 narrowness of the collateral appeal doctrine, why it's
23 narrow, avoiding the need for piecemeal appeals. That's been
24 considered by the Third Circuit in looking at FIRREA and the
25 importance of that, but if you look at the case they rely on

1 most, is Loem, a case that is subsequently discussed by the
2 Supreme Court again in Digital Equipment and the reason that
3 the result in Praxis in the Third Circuit is not surprising
4 is sort of highlighted by the Supreme Court in Digital
5 Equipment, and it's the distinction between the public
6 importance of a statutory or constitutional right as opposed
7 to a private contractual right, and the Court in Digital
8 Equipment, Supreme Court, says, "While there is no need to
9 decide here that a privately conferred right could never
10 supply the basis of a collateral order appeal, but there are
11 surely sound reasons for testing such rights differently than
12 those originating in the constitution or statutes. When a
13 policy is embodied in a constitutional or statutory provision
14 entitling a party to immunity from suit, a rare form of
15 protection, there is little room for the judiciary to gainsay
16 it's, quote, 'importance', close quote." And this is a case
17 where, as again, the Third Circuit has spoken on the
18 importance of the comprehensive litigation scheme in FIRREA
19 and the permissibility of a collateral appeal from a decision
20 by a court that addresses whether the court has properly
21 applied that scheme. Now, again, it's not a unique case.
22 These arise most in the case of immunities from suit and
23 double jeopardy. I mean it's clear that those are proper
24 collateral appeals, but the original case on the collateral
25 order doctrine appeal, Cohen didn't involve that kind of a

1 case, it involved an appeal of a court not to require the
2 plaintiff in a derivative action to post costs. We have
3 Praxis. Moses Cohen is another case. Mark Development. So,
4 while this does arise most in the case of absolute
5 constitutional and statutory immunities, in many ways this is
6 like that, but again, the Third Circuit has looked at this
7 issue, spoken on it, and therefore, under the frivolous test,
8 which is the one Your Honor is applying here, we suggest that
9 you cannot properly find that this is frivolous. Now, let's
10 go spend just a couple of seconds on the substance of the
11 appeal. The debtors spend most of their time addressing that
12 this is an improper collateral order appeal. They spend a
13 little time addressing the substance of the appeal, but I
14 would respectfully suggest that again, Your Honor's already
15 disagreed with us on the substance, but you could not
16 properly characterize our position as frivolous on this
17 particular issue. Indeed, we submitted that to you in a case
18 involving this very set of players here, brought against
19 JPMorgan Chase in Texas. The Court had Your Honor's
20 decision. They had before them that decision. It was
21 submitted in that case by the plaintiffs, reached an entirely
22 contrary decision. Said, "Absolutely this applies to claims
23 against third parties who purchase from the receiver because
24 the claim is one that's essentially attacking the acts of the
25 receiver." It's exactly the same as what happened here, and

1 in that case the Court sent the case to D.C. where that is
2 the exclusive forum to do it because that is where the claims
3 process is now lodged. Your Honor, in light of that, it's
4 directly contrary to Your Honor's decision. There's no basis
5 to conclude - you'd have to conclude Judge Hoyt was off his
6 rocker and he was frivolous too and for that decision
7 effectively -

8 THE COURT: Well, he was not dealing with bankruptcy
9 jurisdiction, which has the exclusive jurisdiction over
10 property of the estate, a different issue and the basis for
11 my decision is different.

12 MR. SACHS: Well, no, Your Honor, you ruled, and
13 with all due respect, your ruling was - I understand your
14 basis for your ruling. You were driven by the Bankruptcy
15 Court's jurisdiction, and we suggest that that can't override
16 FIRREA but what you did expressly rule was that FIRREA's
17 jurisdictional provisions do not apply to claims against
18 third parties. They only apply to the receiver. Judge Hoyt
19 reached an absolutely contrary decision. The case in Texas
20 was brought against JPMorgan Chase just like the debtors'
21 claims here were brought against JPMorgan Chase as the
22 purchaser from the receiver. Judge Hoyt said, "You cannot
23 avoid FIRREA's jurisdictional provisions that apply to claims
24 involving the assets of a receivership estate or the acts of
25 the receiver by suing the purchaser from the receiver." It's

1 directly contrary to Your Honor's ruling even though I
2 understand your ruling may have been motivated by the scope
3 of Bankruptcy Court jurisdiction over the property of the
4 debtor, and there's a direct conflict there, but Judge Hoyt
5 found exactly the opposite, and, Your Honor, there are cases
6 we cited to you before. The Sixth Circuit in The Village of
7 Oakwood. There's a Ninth Circuit case, the Eleventh Circuit
8 case. They reached a conclusion that is different than Your
9 Honor's that FIRREA's bar applies to, in certain
10 circumstances, claims against third party purchasers from the
11 receiver, and while I'm not asking you today to reconsider
12 your decision or agree with me, you've disagreed with us
13 twice, I understand, that's something that, as you
14 understand, we intend to pursue on appeal, but I am saying
15 that you cannot determine that our position is frivolous,
16 i.e., without any reasonable good faith basis, and with
17 respect to the divestiture of jurisdiction in this particular
18 case, that's the limits of the Court's inquiry. So, I
19 understand that the debtors don't like this result. They
20 think it's gamesmanship. They think we're playing fast and
21 loose. They think it's tactical. We think their filing of
22 the claims in this Court while they are simultaneously
23 pursuing their appeal from the denial of the very same claims
24 in the District of Columbia, is tactical. Litigation is on
25 its own, each party pursuing their own interests with

1 reasonable arguments to their client's end, but this is a
2 rule. It is a clear rule. It is a jurisdictional rule. It
3 is not a discretionary rule, and we respectfully ask Your
4 Honor to simply state that you regard yourself as divested of
5 jurisdiction to entertain matters in the adversary proceeding
6 until these appeals are either dismissed as improper under
7 the collateral order doctrine or are disposed of on their
8 merits by the District Court and/or the Third Circuit.

9 THE COURT: Thank you.

10 MR. SACHS: Thank you.

11 MR. ELSBERG: Good morning, Your Honor. David
12 Elsberg, Quinn Emanuel, for the debtors. Just to put this in
13 context, JPMC made motions asking Your Honor to dismiss or
14 stay these proceedings, and Your Honor considered it and
15 rejected it and said, No, these cases will go forward. The
16 cases went forward. They filed notices of appeal. Two
17 months have passed since they filed the notices of appeal.
18 In that time they've asked for a deposition and taken it.
19 They've negotiated discovery. They've served motions.
20 They've served discovery. They argued a motion to dismiss,
21 which they then lost. After all this happened over the
22 course of the two months, after the filing of the notice of
23 appeal, they turn around and essentially what they're saying
24 is, Guess what, Your Honor, that motion, that relief that we
25 asked for and that you rejected, we're giving it to

1 ourselves, and the way we're doing it is we're simply going
2 to fill out a piece of paper that basically says, Dear Your
3 Honor: This case must stop even though you decided it should
4 go forward. This is gamesmanship and it shouldn't be
5 tolerated. Now, Your Honor, there's a fundamental premise
6 which is flawed, which is inherent in their argument, and the
7 premise is that all that matters - I think the language that
8 was used was, "The limit of the inquiry is whether the appeal
9 is frivolous." The appeal is in fact frivolous on the
10 merits, and I'll get to that, but you don't even need to get
11 to that issue. Their brief and the presentation today,
12 whether deliberately or not, ignores the controlling legal
13 standard and a threshold issue that they cannot get over in
14 order for them to prevail. The Third Circuit has said, very
15 clearly along with other circuits, that a case must proceed
16 if the notice of appeal or the putative notice of appeal is
17 of an order that is actually not appealable. If it's not
18 appealable, you can't just fill out a piece of paper and say,
19 the show stops. You can be in the middle of trial. I filled
20 out a piece of paper. Clearly this is not an appealable
21 order, but I unilaterally get to stop the case. That's now
22 how it works. If you look at Venon, it's a Third Circuit
23 decision. It discussed on page 8 of our brief. What the
24 Third Circuit said there is, "An appeal from a non-appealable
25 judgment or order is sometimes characterized as a nullity."

1 And then it goes on to specifically say, "The jurisdiction of
2 the lower court is not lost by the taking of an appeal from
3 an order or judgment which is not appealable." Lepo, a
4 decision that they cite, Third Circuit, on page 8 and 17 of
5 our brief, we discuss it, it likewise says, "A notice of
6 appeal from a non-appealable order does not divest
7 jurisdiction." And by the way, it says that while
8 acknowledging the general rule that a trial court is divested
9 of jurisdiction over a case where a notice of appeal is filed
10 from an order that actually is appealable. The Third Circuit
11 in Lepo, again the case that I'm not sure why they cite, but
12 they did, Lepo relied on a case and quoted approvingly
13 Hitchman from the Fifth Circuit which says the same thing.
14 Ruby from the Second Circuit says the same thing. These are
15 all on page 8 of our brief, and what these cases discuss on
16 page 8 of our brief make clear is that it is this Court's
17 function to look at whether or not the order that is
18 supposedly being appealed actually is appealable, and if it's
19 not appealable, then the show goes on. It's not so easy,
20 otherwise, it would be too easy to abuse this doctrine which
21 is supposed to be a narrow and limited exception, it would
22 come wide open for abuse. Anybody could stop the show
23 whenever they want to. In fact Lepo, by the way, I'll get
24 back to this later, but there was a statement made in the
25 briefs and today that, Sorry, Your Honor, we didn't mention

1 it before, we went forward with depositions, we argued the
2 motion to dismiss, we lost, maybe we should have brought it
3 up but it's not waive-able. If you look at Lepo, what Lepo
4 says is that the divestiture rule is a, quote, "Judge made
5 rule. There is not a ritualistic application of it. A
6 reasoned choice should be made," I'm quoting, "and that a
7 contrary rule would leave the Court powerless to prevent
8 dilatory tactics and disruption." And that was said in a
9 case, by the way, and again I'll get to this later, where the
10 order at issue was one that could have been deemed as a
11 collateral order unlike here where you don't even get passed
12 square one. It is not an appealable order. It's not a
13 collateral order. So you don't even get to assessing the
14 merits of the appeal. So, the question is, the threshold
15 question is, Is this an appealable order? Absolutely, this
16 is not an appealable order. The dispute here, Your Honor, is
17 about forum. What JPMorgan has said over and over again is
18 that this case should be litigated in D.C., and we cite on
19 page 13 of our brief in footnote 7, statements over and over
20 and over again about how it should be, it must be the right
21 place for this litigation to move forward in D.C. What
22 they're not saying is that they have a right to be free from
23 trial for even a day, for even a second. What they're
24 saying is, it should move forward, move forward now in D.C.
25 The United States Supreme Court in Lauro Lines (phonetical),

1 Your Honor, has directly and precisely addressed exactly that
2 type of argument. What happened there is, there was the
3 argument that there was a forum selection clause which said
4 that a case can be heard only in Italy, and the Court denied
5 the motion, and on appeal the argument was, Isn't this a
6 collateral order? Shouldn't the show stop because the right
7 would be destroyed if it moves forward in the wrong forum,
8 and Lauro Lines said, and I'm quoting, that there's no
9 collateral order where, quote, "The lower court has denied a
10 claim not that the defendant has a right not to be sued at
11 all, but that the suit against the defendant is not properly
12 before the particular court because it lacks jurisdiction."
13 That's exactly the type of claim that's being made here, and
14 Lauro Lines, the Supreme Court in a unanimous decision, goes
15 on to say, quote, "The critical question is whether the
16 essence of the claim is a right not to stand trial." And it
17 gives us examples: qualified immunity or absolute immunity.
18 This is going to become relevant in a minute when we discuss
19 Praxis, Your Honor, and what the Supreme Court also said is,
20 "An entitlement to avoid suit is different in kind from an
21 entitlement to be sued in only a particular forum." Which
22 again, is exactly the nature of their argument. Now, Your
23 Honor, in an attempt to get around the very clear holding of
24 Lauro Lines, which is fatal to their argument, we've heard
25 two things. We've heard, number one, that Praxis supposedly

1 helps them. I think they only cited this in a footnote,
2 although we were taken to task by them for not spending lots
3 and lots of time in every case on their footnotes. What
4 Praxis said, Your Honor, is that a right to be free from
5 claims for 90 days could count as a collateral order, akin to
6 what Lauro Lines recognized is a different and narrow type of
7 cases, if it's immunity, if it's double jeopardy, if it's
8 something saying that for a period of time you can be
9 completely free from claims to have a breathing room. That's
10 a different type of case. The second argument that we heard,
11 that again gets them absolutely nowhere, is we've heard the
12 argument that, Well, you know, Your Honor, this is about a
13 statute. This is more important than just a forum selection
14 clause, but if you look at the concurrents in Lauro Lines,
15 what Justice Scalia says clearly is that we have made the
16 same judgment, and I'm quoting, we've applied the same rule,
17 that it's not a collateral order, quote, "When the right not
18 to be tried in a particular court has been created through
19 jurisdictional limitations established by Congress, a
20 statute, or by international treaty." So, the holding of
21 Lauro Lines applies regardless of whether it's a contract
22 selection clause, a treaty selects it, a statute selects it.
23 So, they don't get past square one and again, their brief in
24 the presentation today, they had said it explicitly and
25 completely incorrectly that the inquiry is limited only to

1 whether the appeal is frivolous. Not so. There is a
2 threshold inquiry, is this an appealable order. If it is
3 not, what the cases have said including in the Third Circuit,
4 is the so-called appeal is a nullity, and a nullity cannot
5 and does not divest this Court of jurisdiction. Again,
6 otherwise, this would be wide open for abuse rather than a
7 narrow exception, and I would just note, Your Honor, by the
8 way, that the Third Circuit in Hudson specifically called the
9 FIRREA provision that they're relying on, a quote, "venue
10 provision". So, just like Lauro Lines, we're talking about a
11 venue or forum provision. So, let's just put a bookmark
12 there for a second. That's the key question and they try to
13 hide from Lauro Lines and they can't get past that. Even if
14 they could get past that, and they can't, only then does Your
15 Honor need to get to the question of assessing the merits of
16 the appeal and whether on the merits it's frivolous, and we
17 believe, Your Honor, that the merits of their appeal don't
18 exist, that it is merit-less, and I believe Your Honor said
19 on the transcript last time that the result was dictated by
20 controlling Third Circuit precedent, Rosa and Hudson. Now in
21 Lepo, what the Third Circuit said, again, I mentioned this
22 earlier, is that the divestiture rule is a judge-made rule
23 and it should be applied, not ritualistically but with a
24 reasoned choice, and there what you have is an appeal that's
25 frivolous, an appeal that clearly is merit-less, and you can

1 see which way it's going to be decided. Here it's the Third
2 Circuit that decided Rosa and Hudson, that's going to be
3 receiving this, and I think we know how that's going to turn
4 out, and if there has been delay, if those two things are
5 present, Your Honor, you do have a choice. This is not a
6 situation, subject matter never waive able. Delay does mater
7 and the merits and the weakness or absence of the merits does
8 matter, and that's exactly the situation here, and in terms
9 of the Texas case, this five-page decision, that decision
10 does not cite Rosa, it doesn't analyze the Rosa much less
11 does it even mention or analyze Your Honor's decision, and
12 whether or not in this circuit there's any merit or whether
13 or not an appeal is frivolous in this circuit is controlled
14 by what the Third Circuit Court of Appeals has said. This
15 Court is bound by what the Third Circuit has said not by what
16 a judge in Texas has said, and in our brief we discuss also
17 why we believe that decision doesn't get them anywhere on the
18 analysis. And just before I conclude, Your Honor, I would
19 just like to point out that JPMorgan's brief when they're
20 making points, supposedly in support of the idea that this
21 could be qualified as a collateral order and that therefore
22 they can get past square one, the cases that they cite do not
23 actually support what they're saying. These are cases that
24 deal with completely different situations. So they're the
25 immunity cases that don't help them here. Griggs is one of

1 the first cases that they cite. What Griggs says is, quote,
2 "A premature notice of appeal shall have no effect and will
3 be a nullity." That's one of the leading cases they rely on
4 here. We agree with that statement, a premature appeal is a
5 nullity and has no effect. They also cite - Paragraph (13)
6 of their submission is the paragraph where they say, You know
7 what, outside the context of immunity, outside of the right
8 to be free from suit, there are cases that show that just
9 like here, Your Honor, you can say, you should view this as a
10 collateral order, but those cases don't come close to
11 supporting that. So, for example, the Ehleiter case, that's
12 E-h-l-e-I-t-e-r, I'm not sure how to pronounce it, in that
13 case what the Court said is that the FAA, the Federal
14 Arbitration Act, gave a specific statutory right to bring an
15 appeal. They never got to the question of whether there
16 could be a collateral order. To the contrary, Your Honor,
17 in that case it specifically says there is no basis other
18 than the FAA to appeal this. This could not count as a
19 collateral order. Similarly, Hallock is quoted in paragraph
20 (13) as supposedly showing that in a situation just like
21 this, it's appropriate to deem it as a collateral order that
22 can be appealed. Hallock was an immunity case. Hallock was
23 a case involving 28 U.S.C. 2676, which states, quote, "There
24 can be a, quote, 'complete bar to any action'." That's what
25 was at issue there was the question of whether there could be

1 a complete bar to any action. Then there's the Ariove
2 (phonetical) case where the collateral order doctrine isn't
3 even mentioned much less was there any argument there about
4 the proper forum in which a case should proceed. By contrast
5 here again, the precise nature of the argument, and again, if
6 you look in our brief on page, I believe, 17 of our brief -
7 sorry, page 13 of our brief, footnote 7, over and over and
8 over again JPMorgan has made clear what is the disputed
9 issue. It's an order where Your Honor said, this case should
10 proceed here, not in D.C. where you, JPMC, wanted to proceed.
11 That's the issue. The issue is not the issue of whether or
12 not they're to be completely free from trial, and again, in
13 Lorro, the U.S. Supreme Court made clear, that is exactly the
14 kind of case that should proceed, and that's exactly the kind
15 of case that should not stop the show, and as this Court, as
16 the Third Circuit has said in Lepo and in Venon, when it's a
17 non-appealable order like this one is here under Lauro Lines,
18 the show must go on. Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. SHIEKMAN: Good morning, Your Honor. Larry
21 Shiekman from Pepper Hamilton, appearing for the Unsecured
22 Creditors Committee. We filed a joinder in the debtors'
23 paper, and I just wanted to add a couple of points, if I
24 might. One of them is, I searched the Bankruptcy Rules in
25 vain for a provision that authorized the filing of something

1 called a notice, and I wasn't really sure what JPMorgan
2 wanted the Court to do other than to look at it and say,
3 Well, thank you, I've noticed it, and now I can put it under
4 my desk. So there's a certain brashness, I think, about the
5 way in which they're trying to proceed here, and if they
6 could have come up with a procedural device that would have
7 given them a third opportunity to argue the same issue to the
8 Court, I'm sure they would have done that, and failing to
9 have found one, they now have called it something which the
10 rules don't describe. I think beyond that, I just want to
11 echo a point that Mr. Stratton, my partner, made in an
12 earlier iteration of this argument which is, these two
13 adversary proceedings involve virtually all of the assets of
14 this estate, and the prejudice to the creditors by simply
15 having the Court stand down, having these two adversary
16 proceedings await the outcome of either Judge Sleet or the
17 application they've made to the Third Circuit will continue
18 to prejudice the creditors by causing the occurrence of
19 additional costs and imposing delay on the final disposition
20 of this estate. So we ask that you do what you should do,
21 which is to ignore the notice and let the District Court do
22 whatever it's going to do in response to whatever JPMorgan
23 Chase may dream up next. Thank you.

24 THE COURT: Thank you. Reply?

25 MR. SACHS: Again, Robert Sachs on behalf of

1 JPMorgan Chase. Let me address a few points, Your Honor.

2 First, the point made by the debtors that suggests that Your

3 Honor is permitted to make a wholesale, independent

4 determination as to whether you believe that our appeal is

5 properly a collateral order appeal. The law is precisely to

6 the contrary. That is completely incorrect, and I'd cite you

7 simply to Lepo. This is not a case of a facial nullity of

8 something that is untimely filed or on its face does not

9 comply with the rules when you are asking for a subjective

10 determination, the determination that is required of this

11 Court's, from whose order is being appealed, role is very

12 circumscribed, and it's set forth in Lepo, a Third Circuit

13 case. We hold - and this is a case on the double jeopardy

14 motion. "We hold that an appeal from the denial of a double

15 jeopardy motion does not divest the District Court of

16 jurisdiction to proceed with the trial if the District Court

17 has found the motion to be frivolous and supported its

18 conclusions by written findings. Of course, in the absence

19 of a finding that the motion is frivolous, the trial court

20 must suspend its proceedings once the notice of appeal is

21 filed. In those instances in which it refuses to do so or

22 when its findings are not supported by the record, the

23 concerns of Avni are sufficiently safeguarded by the

24 availability of a stay pursuant to Federal Rules of Appellate

25 Procedure 8 or a writ of mandamus or prohibition under 28

1 U.S.C. 1651. The fact is that the concerns that are
2 expressed by the debtors about dilatory appeals, interfering
3 with proceedings, et cetera, that has been struck by a
4 balance that says, "The Court disposes of those facially
5 frivolous acts on a standard of frivolousness." Otherwise,
6 the issue of whether something is properly appealed as a
7 collateral order is in the Court reviewing the appeal, in
8 this case either the District Court or the Third Circuit.
9 That's number one. So they're entirely incorrect, and Your
10 Honor, again Stewart out of the 10th Circuit, another such
11 case, going through exactly the same thing, the Court
12 explained that it is only after the District Court has
13 determined the defendant's appeal to be frivolous or
14 forfeited that the defendant must seek a stay from the Court
15 of Appeals to prevent the trial from proceeding. Other
16 courts have similarly emphasized the need for a clear and
17 reasoned finding of frivolousness or forfeiture by the
18 District Court in order to prevent the automatic divestiture
19 of jurisdiction. It is an automatic divestiture of
20 jurisdiction. The issue of whether you agree or disagree is
21 not the issue before this Court. That is an issue for the
22 Court of Appeals to the extent they suggest that this is
23 subject to wholesale, independent, we agree, we don't agree
24 review in this Court. They are misstating the applicable
25 law. Lepo could not be clearer on that subject. Second,

1 they rely again entirely on Lauro Lines, however, Praxis
2 itself from the Third Circuit distinguishes Lauro Lines. The
3 issue here undoubtedly involves JPMorgan Chase's and the
4 FDIC's because the FDIC regards this as a claim against them
5 effectively, right not to be subjected to claim in this Court
6 at all, but it involves more than that. It involves, as
7 Praxis said, the protection of Congress's mandated claims
8 process, enforcement of that claims process. That is what is
9 irreparably lost and that is why we believe, that is why
10 Praxis says that an appeal under FIRREA is subject to
11 collateral order review where a court does not honor those
12 strict limits on jurisdiction and protection of the claims
13 process that Congress carefully crafted in the most important
14 piece of thrift legislation in the nation's history. That's
15 how it was characterized. It has tremendous public
16 importance, and that's why FIRREA appeals have already been
17 found in this case, a failure to adhere to a FIRREA issue.
18 FIRREA limit on jurisdiction has been found in the Third
19 Circuit to be a proper subject of collateral order appeal.
20 Again, we have a good faith basis even if Your Honor believes
21 that under Lorro or some other case by Praxis should have
22 been decided differently, might be decided differently today,
23 you would have decided differently, that's not the standard.
24 We have a good faith basis to claim that this is a subject to
25 collateral order review, that is the scope of the inquiry at

1 this point in time, and Lorro is again distinguished by
2 Praxis and there's an explanation of why Lorro is also
3 characterized in Digital Equipment, and so continued
4 reference to Lorro, Lorro is a different case. It's a
5 private contract case, and undoubtedly, you know, everything
6 is continuum and you can understand why different decisions
7 are reached in different cases. You can always say they're
8 not consistent with one another. They are consistent. Maybe
9 they had something funny for breakfast that day when they
10 decided that one. It was this justice or that justice, and
11 you rationalize things, but in this case we do have a Third
12 Circuit case and it is specifically on FIRREA, and it does
13 indicate why a collateral order appeal is appropriate. And
14 they again go back to the notion that collateral order
15 appeals are limited to the complete divestiture of
16 jurisdiction cases, a right never to trial. As I say, that's
17 part of the argument, but it also begs the question of the
18 importance of FIRREA, the public importance of that, the
19 importance of it to the FDIC, which underlay the stay motion,
20 the complete stay motion in this particular case. It also
21 ignores the fact that there are many - the first case ever
22 decided, the genesis of the collateral order doctrine is not
23 a complete defense to a jurisdiction no-suit case. It's
24 Cohen v. Beneficial Life, it involves a case involving a
25 failure to post security in a derivative action. So there

1 are cases that are different than that. That's one strand,
2 that's undoubtedly where it comes up most often, but it is
3 not the sole issue. But again, these are debates on the
4 merits as to whether Praxis is going to control, should
5 control, should be reviewed, should be reversed, should be
6 disregarded, can be distinguished in some way, but Praxis is
7 the this Third Circuit decision. It does find it appropriate
8 for reasons that are equally applicable here. Finally, Your
9 Honor, with respect to the comments from the Creditors
10 Committee on prejudice, we've heard time and time and time
11 again how these adversary proceedings involve the most
12 significant assets of the estate and we are delaying it. We
13 are delaying nothing in this case, Your Honor. The fact is
14 that the debtors filed claims to these very assets in the
15 receivership. They filed an action in D.C. They are
16 delaying the resolution of their entitlement to those assets
17 by filing the same claims in this Court, that is our position
18 on this.

19 THE COURT: How does that delay the D.C. action?

20 MR. SACHS: It delays the D.C. action because you
21 are - two Courts are resolving the very same matter, and,
22 Your Honor, the D.C. action is going to have to determine in
23 that Court the effect to be given to the denial of the claims
24 by the receiver in the receivership process, and so, they
25 are, for example, asserting claims here to assets that are

1 the subject of claims that they made in the receivership that
2 were denied by the receiver. Now it may be that they can
3 convince the District Court in D.C. that those denials were
4 improper and they should be adjudicated *de novo* on their
5 merits, that there was something wrong with the denial, but
6 that is an integral part of the receivership resolution
7 process and I respectfully suggest you can't adjudicate the
8 claims here anew on a clean slate as though those denials
9 never happened, which is what they're trying to do here.

10 THE COURT: They're suing two different parties in
11 two different forums.

12 MR. SACHS: No, Your Honor. That's where you and we
13 disagree. Respectfully, they have sued us but as Judge Hoyt
14 recognized while they've named the third-party buyer their
15 claim is based upon whether these were or were not assets of
16 the receivership at the time of receivership. We are simply
17 a transferee of whether those were assets. We didn't do
18 anything independently wrong about those assets -

19 THE COURT: Well, that's not quite what they allege
20 in their adversary.

21 MR. SACHS: Well, that's -

22 THE COURT: They allege that you did do something
23 wrong independently of the actions of the FDIC.

24 MR. SACHS: Well, that's not entirely correct, Your
25 Honor. So, for example, they claim they're entitled to

1 certain amounts of money that are on deposit. Those either
2 were or were not deposits at the time of receivership to
3 which the debtors did or did not have an entitlement. We
4 simply got what the FDIC had, trust preferred securities.
5 They're claiming that there are certain rights in trust
6 preferred securities. Again, those either were or were not
7 assets of the receivership estate. At the time of the
8 receivership, we either got them from the receivership or we
9 didn't get them. We didn't do anything with respect to
10 those. They're seeking to rescind the PNA agreement by which
11 we bought the assets and liabilities from the receiver.
12 That's a direct challenge, while it undoubtedly affects us,
13 they say it's an improper contract. They have a whole bunch
14 of things, but fundamentally, it's a challenge to the acts of
15 the receiver, that the receiver erred in entering into that,
16 not that we are independently liable for that, that it's a
17 contract that the receiver should not have entered into under
18 a variety of theories. It directly challenges the acts of
19 the receiver. They have claims to intellectual property -

20 THE COURT: We're rearguing what we've -

21 MR. SACHS: We are.

22 THE COURT: - heard before.

23 MR. SACHS: But you did raise the issue with me,
24 Your Honor, and I didn't - you raised this one. I didn't
25 raise this one, but so I would respectfully suggest it is the

1 same sort of thing, but my last point was in response to the
2 comments from the Unsecured Creditors Committee which is
3 there are adverse consequences that would befall a delay here
4 due to that. I'm suggesting they could be mitigated in other
5 ways, but the Third Circuit has made clear in a case we cited
6 for you. It's Venon, and I believe the other side cited to
7 you where they go specifically into that issue and they say,
8 You know what, that's unfortunate. We wish it weren't the
9 case, but there are benefits to be accorded to this rule to
10 one court having jurisdiction over an issue at the same time,
11 and there are reasons for having a collateral appeal
12 doctrine, and there are reasons that when an appeal is filed,
13 the lower court is divested of jurisdiction so you don't have
14 two courts considering the same issue. That's why, Your
15 Honor, a lower court can't even reconsider its order while an
16 appeal is pending even if it suddenly said tomorrow, Oh, my
17 God, you know, I made a - assume you said, Your Honor, You
18 know, I looked at Judge Hoyt, I really messed up. I made a
19 mistake. I'd like to change my order. You don't have the
20 power to do that. That might be efficient, but you don't
21 have the power to reconsider your order because you're
22 divested of jurisdiction over that order once the notice of
23 appeal is filed. Now, I know that seems crazy in some sense,
24 but that is the clear rule, and that is the interplay between
25 courts of appeal and lower courts, and it's the impact of the

1 divestiture rule which is only one court decides it. That's
2 why the impact on the lower court is, you review it simply to
3 determine if the appeal is frivolous and as the Third Circuit
4 said, You're inquiry must be one for frivolousness, and you
5 either need to recognize the divestiture or find by written
6 findings that the appeal is one that's frivolous, Your Honor.

7 THE COURT: Thank you.

8 MR. ELSBERG: Your Honor, on the Rosa point that was
9 argued, it's like groundhog day and on the Lepo point, it's
10 like Alice in Wonderland. I can't understand, Your Honor,
11 and if you haven't, I hope you will look at Lepo. Why JPMC
12 keeps returning to Lepo as if Lepo supports the notion that
13 this is an appealable order is a mystery. Lepo is a case
14 that helps us and demonstrates that even if you get past step
15 one, which is to determine that it could be a collateral
16 order, then there's another way that the Court can decide
17 that this proceeding should continue. Lepo, remember, was
18 about immunity. It was not a Lauro Lines situation where
19 clearly it was a non-appealable order. It was a
20 quintessential type of appealable order because it was about
21 immunity, and what the Court said in Lepo is, even in that
22 case, I have to take a practical approach, a reasoned
23 approach, and if this looks strategic, dilatory, and merit-
24 less I can still stop the show, but that is a case where
25 hurdle one had been cleared. Here they can't get past hurdle

1 one, they can't get past Lauro Lines, and if there's any
2 doubt on that, Your Honor, we filed our brief yesterday. We
3 had less than a week to file it, and on page 8 of our brief
4 we cite case after case including Venon, and I mentioned it
5 before, which says the Third Circuit does not just go to step
6 two and look at frivolousness which is an independent reason
7 to say that jurisdiction will be kept or shared, but this
8 Court can and should look at, is this a non-appealable order.
9 Again, I'm quoting from the Third Circuit in Venon, "An
10 appeal from a non-appealable judgment or order is sometimes
11 characterized as a nullity." Again, I'm quoting from Venon,
12 the Third Circuit. "The jurisdiction of the lower court is
13 not lost by the taking of an appeal from an order or judgment
14 which is not appealable." Again, there's Lepo which cites to
15 Hitchman, a Fifth Circuit case, which we quote in our brief,
16 and Rubia, a Second Circuit case which is quoted in our brief
17 and what they say is whether you call it a premature appeal,
18 whether you call it a non-appealable order, whether you call
19 it effective appeal, if you can't get past step one and they
20 can't because of Lauro Lines then you don't need to get to
21 step two which is, by the way, is this strategic and dilatory
22 and under this judgment rule, should I still say that this
23 case will move forward. So that's Lepo. Again, they went
24 back to Praxis. Praxis, Your Honor, was about the stay
25 provision, a right to be free from suit for a period of time,

1 completely free from claims, again, like immunity, and
2 completely unlike Lauro Lines which is dead on point where
3 the argument is, JPMorgan's argument here, which is, Please,
4 we want to litigate this and now in a different forum which
5 they've said *ad nauseam* and we quote just some of their clear
6 statements on this point in our brief, and again, they made
7 the point, Lauro Lines is only about a forum selection clause.
8 Please, Your Honor, take a look at the concurrence, the last
9 sentence I believe in Scalia's concurrence, it says, "By the
10 way, we've applied the identical rule when the issue of forum
11 has to do with an argument about a statute, an act of
12 Congress, or a treaty designating the forum, same result."
13 And, Your Honor, I would just finish with where I started
14 initially, which is to just keep in mind, go back to basics
15 on this doctrine. The courts have said again and again, this
16 is a narrow doctrine. It is a narrow exception, and if the
17 interpretation that they're pushing were correct, it would
18 blow it wide open to abuse by anyone at any stage in a
19 proceeding. It could be right in the middle of a trial and
20 someone could give a notice and say, Your Honor, I previously
21 moved to stay. I previously moved to stay on exactly the
22 grounds where I am now making this appeal. Your Honor
23 rejected the motion to stay on solid grounds, I continue to
24 litigate. How long can they proceed? Are they saying they
25 could go to trial and benefit if they don't like how it's

1 going? They can say, Here's a notice, I'm stopping the show
2 now. Maybe after the trial and before the verdict, if they
3 think it didn't go well. Here they just waited to argue a
4 motion to dismiss, which they lost. They just took a
5 deposition, maybe they didn't like how it went and they're
6 saying, Guess what, here's a piece of paper, Your Honor, you
7 can't even look at this. That would be the most wildly
8 inefficient and a wide-open rule. The exception would
9 swallow the rule. That's not what the case law holds, and
10 just before I finish, Your Honor, just to correct one other
11 thing that was said. I believe it was JPMorgan that filed
12 proofs of claims here and filed the adversary proceedings
13 here, and I think something was said about that that was not
14 completely accurate. Thank you, Your Honor.

15 THE COURT: Okay. Alright, well, let me issue my
16 ruling. Although I'm not quite sure what I'm ruling on,
17 there is no motion before me. There's a notice of a
18 divestiture, but I take it the parties are asking me whether
19 the adversary proceeding will proceed, and in my opinion,
20 yes, it will proceed. It is clear that the appeal of the
21 denial of a motion to dismiss or the denial of a motion to
22 stay a proceeding is not appealable. The only exception to
23 that that has been cited is the collateral order doctrine.
24 The Supreme Court has made it clear that this is a narrow
25 exception, and the Supreme Court held in Lauro Lines that it

1 does not apply to issues of where a party can be sued as
2 opposed to whether a party can be sued. Praxis is not
3 applicable. It dealt with whether a party can be sued, i.e.,
4 whether a 90-day stay applied or a 45-day stay applied, not
5 to an issue of where a party can be sued. So it just is not
6 applicable to this case. The fact that JPMC has continued to
7 appear before me and to continue to proceed with this
8 adversary for the past four months, I think evidences an
9 acknowledgment that really their position is frivolous. Need
10 I say it, I do say it, the argument is frivolous that the
11 collateral order doctrine applies. With respect to the
12 merits of the appeal, I've already made my ruling on that
13 numerous times. I need not issue it again. I think the
14 decision of JPMC that I do not have jurisdiction is
15 frivolous. The adversary proceedings will proceed until and
16 unless the Appellate Court decides otherwise, but they need
17 not be held up pending that appeal.

18 MR. ELSBERG: Your Honor, if I might, I was just
19 hoping that I could raise the issue of scheduling a hearing
20 date for the summary judgment motion on the deposit issue,
21 and we would propose, if it works for you -

22 THE COURT: Have I seen - has the briefing been
23 completed?

24 MR. ELSBERG: Yes.

25 THE COURT: When did the notice of completion of

1 briefing get filed?

2 MR. ELSBERG: We'll file a notice today. We're
3 hoping we could just get something on the calendar, if Your
4 Honor is agreeable, for the week of October 12.

5 THE COURT: Is that the week of - that's the week
6 before the NCBJ?

7 MR. ROSEN: I think that's right, Your Honor. I
8 think it is the following weekend.

9 MR. SHIEKMAN: Your Honor, could I ask . . .
10 (microphone not recording) the following week?

11 THE COURT: The following week I'm out.

12 MR. SHIEKMAN: (Microphone not recording.)

13 THE COURT: I'm going to ask the parties, I'm going
14 to talk to Ms. Capp, I'm not going to set, but as I
15 understand it, the parties are suggesting then the week of
16 October 25th?

17 MR. ELSBERG: Or, Your Honor, we would prefer
18 October 12 or if it could be October 8 or 9, and if it can't
19 be sooner then, yes, the following week.

20 THE COURT: Well, it can't be the 9th.

21 MR. ELSBERG: Okay. We can try to work it out
22 together. We can work it out together.

23 THE COURT: Okay.

24 MR. ELSBERG: Thank you, Your Honor.

25 THE COURT: Get a date from Ms. Capp. Thank you.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

CHAPTER 11

WASHINGTON MUTUAL, INC., et al.¹

Debtors.

Case No. 08-12229 (MFW)

Jointly Administered

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,

Plaintiff,

v.

Adv. Proc. No. 09-50551 (MFW)

WASHINGTON MUTUAL, INC. AND WMI
INVESTMENT CORP.,

Defendants for all claims,

-and-

FEDERAL DEPOSIT INSURANCE
CORPORATION,

*Additional Defendant for
Interpleader Claim.*

**RESPONSE OF PLAINTIFF JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION, TO DEFENDANT FEDERAL DEPOSIT
INSURANCE CORPORATION'S MOTION TO STAY ADVERSARY PROCEEDINGS**

Plaintiff JPMorgan Chase Bank, National Association ("JPMC"), by its undersigned attorneys, files this response ("Response") to the Motion of Defendant Federal

¹Debtors in these chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395). Debtors continue to share their principal offices with the employees of JPMorgan Chase, located at 1301 Second Avenue, Seattle, Washington 98101.

Deposit Insurance Corporation (“FDIC”) to Stay Adversary Proceedings. In support hereof, JPMC respectfully represents as follows:

PRELIMINARY STATEMENT

1. JPMC agrees with the FDIC that the “first-to-file” rule applies in this case.

This rule requires that Debtors’ first-filed action, *Washington Mutual, Inc. et al. v. FDIC*, Civil Action No. 1:09-cv-00533 (RMC) (D.D.C. Mar. 20, 2009) (the “D.C. Action”), be decided first, and empowers this Court to transfer or stay any later-filed proceeding. Here, transfer would be appropriate because this case is “materially on all fours” with the D.C. Action and, at minimum, all of the Debtors’ counterclaims in this adversary proceeding (“JPMC’s Adversary Proceeding”) are subject to Title 12 of the U.S. Code’s jurisdictional bar. *See* 12 U.S.C. § 1812(d)(13)(D)(i)–(ii) (“Title 12 Jurisdictional Bar”). More specifically, Debtors’ counterclaims challenge the transaction through which the FDIC, as receiver for Washington Mutual Bank, Henderson, Nevada (“WMB”), disposed of assets and/or interests of WMB, and thus (i) concern “a determination of rights with respect to[] the assets of any depository institution for which the Corporation has been appointed receiver” or (ii) “relat[e] to any act or omission of such institution or the Corporation as receiver.” *Id.* Therefore, transfer to the D.C. Action is the best way to effectuate both the first-filed rule and the Title 12 Jurisdictional Bar.

2. Alternatively, JPMC supports a stay of its Adversary Proceeding, at this juncture, on the expectation that the District Court of the District of Columbia will permit its intervention in the D.C. Action and resolve most (if not all) of the parties’ claims. The D.C. Court is also the only court with jurisdiction under Title 12 to determine many of the issues raised by the Debtors’ counterclaims. Accordingly, although JPMC respectfully urges that transfer is the preferred course, the alternative of a stay would be appropriate, at this juncture,

both under the first-filed rule and under the District Court of Delaware's three-factor test for granting a stay.²

BACKGROUND

3. On September 25, 2008, the Office of Thrift Supervision closed WMB and appointed the FDIC to act as receiver for WMB. Thereafter, JPMC and the FDIC entered into a Purchase & Assumption Agreement (the "P&A Agreement"), whereby JPMC acquired from the FDIC substantially all of the assets and assumed certain liabilities that formerly belonged to WMB.

4. On December 30, 2008, Washington Mutual, Inc. ("WMI"), WMB's former parent holding company, and WMI Investment Corp. (together, "Debtors") submitted claims to the receivership, alleging that the FDIC, among other things, improperly took assets belonging to WMI. On January 23, 2009, the FDIC disallowed those claims. On March 20, 2009, Debtors commenced the D.C. Action, in which Debtors challenge the FDIC's disallowance of their claims and assert an ownership interest in certain assets sold under the P&A Agreement to JPMC. JPMC has moved to intervene in the D.C. Action.

5. On March 24, 2009, JPMC filed the above-captioned adversary proceeding, asserting ownership of, or interests in, certain of the disputed assets at issue in the D.C. Action. For many of these assets, JPMC requested that, as a threshold matter, this Court declare Debtors' D.C. Action the proper forum in which to resolve the parties' competing claims. (See, e.g., Complaint, ¶¶ 183, 195, 204, JPMC Adversary Proceeding (Bankr. D. Del. Mar. 24,

² JPMC reserves all of its additional rights, remedies, and arguments with respect to this Court's jurisdiction over the counterclaims and disputes raised thereby, including, without limitation, arguments that the reference to this Court must be or should be withdrawn.

2009) (“JPMC Compl.”) (seeking declaratory judgment that these claims should be resolved in the D.C. Action).)

6. Debtors have answered in JPMC’s Adversary Proceeding and alleged eighteen counterclaims. (Debtors’ Answer & Counterclaims in Response to the Complaint of JPMorgan Chase Bank, N.A., ¶¶93-212, JPMC Adversary Proceeding (Bankr. D. Del. May 29, 2009) (“Debtors’ Ans. & Cntrclms”)). The counterclaims are entirely duplicative of Debtors’ claims in the D.C. Action. (*Compare, e.g.*, Debtors’ Ans. & Cntrclms ¶¶ 93-103 *with* Complaint, ¶¶ 25-28, D.C. Action (D.D.C. Mar. 20, 2009) (“D.C. Compl.”) (seeking recovery of capital contributions from WMI to WMB); *compare* Debtors’ Ans. & Cntrclms ¶¶ 104-38 *with* D.C. Compl. ¶¶ 29-35 (seeking to avoid the transfer of the Trust-Preferred Securities); *compare* Debtors’ Ans. & Cntrclms ¶¶ 139-52 *with* D.C. Compl. ¶¶ 36-40 (seeking to avoid allegedly preferential transfers to WMB by WMI).) Moreover, each counterclaim attacks the FDIC receivership and the subsequent P&A Agreement between the FDIC and JPMC and, therefore, is subject to the Title 12 Jurisdictional Bar.

7. Notwithstanding the pendency of the D.C. Action and this adversary proceeding, on April 27, 2009, Debtors filed a complaint for turnover of estate property, Adversary Proceeding No. 09-50934 (“Turnover Action”). The Turnover Action relates to deposit accounts that are the basis of Debtors’ “Deposit Claims” in the D.C. Action and the FDIC’s counterclaims in the D.C. Action, as well as three counts in this adversary proceeding.

8. On June 1, 2009, the FDIC moved to stay JPMC’s Adversary Proceeding and to intervene in the Turnover Action, in order to bring an equivalent motion to stay.³ The

³ For the same reasons asserted in the FDIC’s motions to stay and supporting memorandum, JPMC moved to stay the Turnover Action, in the event it is not dismissed. The alternative of a transfer of that action would also be acceptable, but is unnecessary because the Turnover Action is entirely duplicative of claims Debtors have raised in the D.C. Action and JPMC’s Adversary Proceeding. The proposed stay of Debtors’ Turnover Action is more fully addressed in separate briefing.

FDIC asserts that the stays are appropriate because the claims in these two proceedings seek “a determination of rights with respect to[] the assets” of WMB or relate to an “act or omission of such institution or the Corporation as receiver,” *see* 12 U.S.C. § 1812(d)(13)(D)(i)–(ii), and are therefore within the scope of the ~~Title 12 Jurisdictional Bar of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989~~, Pub. L. No. 101-73, 103 Stat. 183 (“FIRREA”). The FDIC further asserts that a stay is appropriate so that the claims may be heard in the D.C. Action, the first-filed action brought by Debtors.

ARGUMENT

9. JPMC agrees that the “first-to-file” rule applies in this case. Debtors’ D.C. Action was the first-filed action of the three, materially related cases. JPMC’s Adversary Proceeding (the second-filed action) raises claims to the same disputed assets at issue in the D.C. Action. The Debtors’ Turnover Action (the third-filed action) raises claims to the same “Deposits” that are at issue in the D.C. Action and JPMC’s Adversary Proceeding.

10. “The first-to-file rule gives courts the power to stay, enjoin, or transfer a later-filed case.” *Allianz Life Ins. Co. of N. America v. Estate of Bleich*, Civ. Action No. 08-cv-668 (SDW-MCA), 2008 WL 4852683, at *3 (D.N.J. Nov. 7, 2008); *accord G & G LLC v. White*, 535 F. Supp. 2d 452, 466 (D. Del. 2008) (*citing Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 929 (3d Cir. 1941)) (the Third Circuit’s first-to-file rule grants the court discretion to stay or transfer the second-filed case). In order to “encourage sound judicial administration,” the rule requires that, where federal courts have concurrent jurisdiction over “similar cases,” “the court which first had possession of the subject must decide it.” *Allianz*, 2008 WL 4852683, at *3.

11. An immediate transfer of JPMC’s Adversary Proceeding to the D.C. Action would best “encourage sound judicial administration.” *See also* Fed. R. Bankr. P. 1014(a)(1) (bankruptcy court may *sua sponte* transfer venue “in the interests of justice”); *In re* {683.001-W0000545.}

Donald, 328 B.R. 192, 198 (9th Cir. B.A.P. 2005) (bankruptcy court may *sua sponte* transfer venue under its 11 U.S.C. § 105(a) equitable powers). Not only do the two proceedings materially overlap, but because Debtors' counterclaims relate to assets of the WMB receivership, acts or omissions of the FDIC, or both, the Congressional scheme for judicial review of receivership claims, set out in FIRREA and Title 12 of the U.S. Code, further commands which courts may hear Debtors' counterclaims.⁴ See 12 U.S.C. § 1821(d)(13)(D)(i)-(ii). Here, because of how the Debtors elected to pursue their claims, Title 12 of the U.S. Code restricts judicial review of these counterclaims to the action the Debtors initiated in the U.S. District Court for the District of Columbia. See, e.g., 12 U.S.C. §§ 1821(d)(5), (6)(A), (13)(D); *Nat'l Union Fire Ins. Co. v. City Sav.*, 28 F.3d 376, 383 (3d Cir. 1994); see also *Village of Oakwood v. State Bank & Tr. Co.*, 539 F.3d 373, 386 (6th Cir. 2008) (holding that the Title 12 Jurisdictional Bar encompasses a suit against a bank that purchased assets from the receivership).

12. In the alternative, JPMC supports a stay of its Adversary Proceeding, at this juncture, on the expectation that the D.C. Court will permit its intervention in the D.C. Action and resolve most, if not all, of the parties' claims. A stay would be appropriate under the first-filed rule, as explained above, and additionally, under the Delaware District Court's three-factor test for granting a stay, articulated in *Pegasus Development Corp. v. DirecTV, Inc.*, No. Civ.A. 00-1020-GMS, 2003 WL 21105073, at *1 (D. Del. May 14, 2003).

⁴ The Court need not decide whether Title 12 Jurisdictional Bar does, as the FDIC asserts, encompass all of JPMC's adversary claims because the first-filed rule provides a sufficient basis for stay and/or transfer of all parties' claims. The first-filed rule applies to all of JPMC's claims in the Adversary Proceeding, Debtors' counterclaims, and the parties' defenses because they are "materially on all fours" in that they arise from the same facts and involve the same core factual and legal disputes already at issue in the D.C. Action. *Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 334 n.6 (3d Cir. 2007) (first-filed rule applies where the cases are "materially on all fours" with each other and where "the issues have such an identity that a determination in one action leaves little or nothing to be determined in the other").

13. Under *Pegasus*, courts deciding a stay should consider:

(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and whether a trial date has been set.

Id. at *1; *accord Zoetics, Inc. v. Yahoo!, Inc.*, No. Civ.A. 06-108-JJF, 2006 WL 1876912, at *1

(D. Del. July 6, 2006). Here, if the Court does not transfer the JPMC Adversary Proceeding, a stay of this case and the Turnover Action (if it is not dismissed) would be appropriate, at this juncture. The stay would in no way prejudice the Debtors, as the FDIC seeks only to prioritize the action that the Debtors chose to file first. The stay would also greatly simplify the issues before this Court by resolving non-bankruptcy questions of federal regulatory law in a court of undoubted jurisdiction. Lastly, no trial date has been set, and no discovery has begun in this Court.

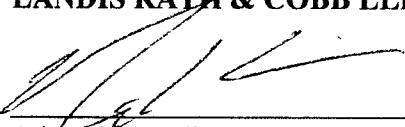
CONCLUSION

14. For the foregoing reasons, Plaintiff JPMC respectfully submits that JPMC's Adversary Proceeding should be transferred to the U.S. District Court for the District of Columbia or, in the alternative, stayed.⁵

⁵In the event the Court grants a stay, JPMC further requests that any action by the Debtors, the Committee, or any party in interest with respect to the assets that are the subject of the D.C. Action and/or the JPMC Adversary Proceeding, including JPMC's proofs of claim with respect to those assets, also be stayed, except for the consensual resolution of issues between JPMC and the Debtors that are jointly submitted to the Court for approval after appropriate notice to parties in interest.

Dated: June 15, 2009
Wilmington, Delaware

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

	X
<i>In re:</i>	:
WASHINGTON MUTUAL, INC., <u>et al.</u> ¹	:
Debtors.	:
	:
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:
Plaintiffs,	:
v.	:
JPMORGAN CHASE BANK, N.A.,	:
Defendant.	:
	X

**ORDER DENYING (A) MOTION OF DEFENDANT
JPMORGAN CHASE BANK, N.A. TO STAY
AND (B) MOTION OF INTERVENOR-DEFENDANT
FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER, TO STAY OR DISMISS ADVERSARY PROCEEDING**

Upon (a) the motion, dated June 1, 2009 (the “JPMC Motion”) [Docket No. 31], of JPMorgan Chase Bank, National Association (“JPMorgan”) for an order staying, in the event it is not dismissed in its entirety, the above-captioned adversary proceeding (the “Adversary Proceeding”) commenced by Washington Mutual, Inc. and WMI Investment Corp. (collectively, the “Debtors”), and (b) the motion of intervenor-defendant Federal Deposit

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor’s federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

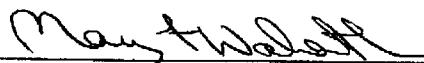
Insurance Corporation, as receiver for Washington Mutual Bank (the “FDIC-Receiver”) to stay, or in the alternative, dismiss the Adversary Proceeding [Docket Entry No. 29, Exhibit A] (the “FDIC-R Motion”, and together with the JPMC Motion, the “Motions”), all as more fully set forth in the Motions; and the Washington Mutual, Inc. Noteholders Group [Docket No. 38] and the Debtors [Docket No. 39] having each filed an opposition to the Motion on June 15, 2009; and a joinder in the Debtors’ opposition having been filed by the Official Committee of Unsecured Creditors on June 15, 2009 [Docket No. 40] (collectively, the “Opposition Papers”); and the Court having jurisdiction to consider the Motions, the Opposition Papers, and all related filings in connection therewith and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having granted by separate Order the motion of the FDIC-Receiver to intervene in the Adversary Proceeding; and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409 to consider the Motions; and due and proper notice of the Motions and the Opposition Papers having been provided, and it appearing that no other or further notice need be provided; and a hearing having been held before the Court with respect to the Motions, the Opposition Papers, and related filings on June 24, 2009 (the “Hearing”); and upon the record of the Hearing and for the reasons set forth on the record of the Hearing, it is hereby

ORDERED that the Motions and the relief requested therein are denied in their entirety; and

ORDERED that this Order having resolved all matters for which the intervention of the FDIC-Receiver in this Adversary Proceeding was granted, no further pleading or response shall be required from the FDIC-Receiver in this Adversary Proceeding.

Dated: Wilmington, Delaware

October, 2009


THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

No. 07-76

In the Supreme Court of the United States

JOHN HENRICHIS AND
ANNE HENRICHIS, PETITIONERS

v.

VALLEY VIEW DEVELOPMENT, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE
CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that 12 U.S.C. 1821(d)(13)(D) and (j), which limit a court's jurisdiction over claims against the Federal Deposit Insurance Corporation (FDIC), do not restrict suits against assignees of assets that were formerly owned by an FDIC receivership that has been terminated.
2. Whether the court of appeals correctly dismissed petitioners' claim against the FDIC receivership, which had been terminated, with all its assets distributed, three years before petitioners filed their claim with the FDIC.

(I)

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In the Supreme Court of the United States

No. 07-76

**JOHN HENRICHIS AND
ANNE HENRICHIS, PETITIONERS**

v.

VALLEY VIEW DEVELOPMENT, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE FEDERAL DEPOSIT INSURANCE
CORPORATION IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 474 F.3d 609. The order of the district court (Pet. App. 15a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2007. A petition for rehearing was denied on April 19, 2007 (Pet. App. 32a-33a). The petition for a writ of certiorari was filed on July 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from a dispute between petitioners and respondent Valley View Development (Valley View)

(1)

about whether a deed of trust owned, in part, by petitioners encumbered a parcel of real property (the Balboa lot) owned by Valley View. The dispute had been fully litigated in state court before petitioners filed this federal court action and added the Federal Deposit Insurance Corporation (FDIC or Corporation) as a party. Pet. App. 3a-7a, 9a, 107a, 109a.

1. In 1990, Valley View owned two plots of land, the Balboa lot and the Chatsworth lot, in Granada Hills, California. Petitioner John Henrichs and respondents Michael Blaha and Marc Gelman formed Granada Plaza Associates, Ltd. (GPA) to purchase and to develop the Chatsworth lot. GPA could not purchase that lot separately until a tract map subdividing it from the Balboa lot had been recorded, so GPA purchased both lots from Valley View. Pet. App. 4a.

GPA leased the Balboa lot to Valley View for one dollar per year and granted it an option to repurchase the lot for one dollar after the tract map was recorded. The ground lease provided that, if Valley View exercised the repurchase option, GPA would convey the Balboa lot to Valley View in fee simple, free of all liens and encumbrances. Pet. App. 4a.

GPA obtained a construction loan from Capital Bank of California to develop the Chatsworth lot. The loan was guaranteed by Gelman and Blaha and secured by a deed of trust on both the Chatsworth and Balboa lots. Pet. App. 4a, 17a.

After the tract map was recorded in 1992, Valley View exercised its option to repurchase the Balboa lot. Valley View believed that it obtained title free and clear of the lien created by the deed of trust. Pet. App. 5a.

In June 1993, the FDIC was appointed receiver of Capital Bank and succeeded to Capital Bank's interest

in the construction loan and deed of trust. Pet. App. 5a. As required by statute, the FDIC published notice to creditors that they must submit any claims against the receivership for resolution by the FDIC's administrative claims process no later than October 8, 1993. See 12 U.S.C. 1821(d)(3)(B).

In 1994, GPA's loan was in default. The FDIC entered into a settlement agreement (FDIC Settlement Agreement) with GPA and the two loan guarantors (Gelman and Blaha) under which they agreed to pay the FDIC \$300,000, and the FDIC agreed to cancel or to assign the loan and the deed of trust to any party designated by GPA. Pursuant to GPA's instructions, the FDIC assigned its interest in the loan and deed of trust, "without recourse, representation or warranty, expressed or implied" (Pet. App. 43a), to various parties, including petitioners, who received a 22.38% interest. *Id.* at 5a, 18a-19a, 41a-43a.

2. In 1996, a dispute arose concerning whether the Balboa lot was subject to a lien based on petitioners' interest in the deed of trust, and Valley View filed a state court action to quiet title to the property. In December 2001, Valley View amended its complaint, requesting a reformation of the FDIC Settlement Agreement to reflect the contracting parties' intent to release any lien on the Balboa Lot. The state court granted that request and ordered petitioners to execute a release of their interest in the lien on the Balboa Lot. The California Court of Appeal affirmed that judgment, and the California Supreme Court denied a petition for further review. Pet. App. 5a-6a, 18a-19a, 43a-49a.

3. The FDIC receivership was never made a party to the state court action, and petitioners did not file any claim with the receivership. On January 1, 2001, before

Valley View had amended its complaint in the state court litigation, the receivership was terminated, because all available assets to pay outstanding and approved claims had been distributed. On March 31, 2004, more than three years after the receivership had been terminated, petitioners sent a letter to the FDIC claiming damages for the FDIC's purported breach of the agreement assigning the loan and deed of trust. The FDIC took no action on that claim, which was untimely. Pet. App. 9a, 11a, 109a-110a; 12 U.S.C. 1821(d)(5)(C) (claims not filed within the time limit specified by the FDIC in its notice to creditors to present their claims shall be disallowed unless they are filed in time to permit payment).

4. In June 2004, petitioners filed the instant suit in the United States District Court for the Central District of California against Valley View and others, including the FDIC. Pet. App. 15a. Petitioners sought, among other things, a declaration that the state court judgment in favor of Valley View was void because the state court lacked jurisdiction over Valley View's claims. *Id.* at 6a, 8a, 15a; Pet. 10. Alternatively, petitioners sought damages from the FDIC based on a claim that the state court judgment rendered the FDIC in breach of the assignment agreement. *Ibid.* The district court held that the *Rooker-Feldman* doctrine barred petitioners' attempt to seek federal review of a state court judgment, and the district court dismissed the suit for lack of subject matter jurisdiction. Pet. App. 15a-31a.

5. The court of appeals affirmed the dismissal. Pet. App. 1a-14a. The court held that petitioners' attempt to void the state court judgment was barred by the *Rooker-Feldman* doctrine, which precludes federal district courts from exercising appellate review over final state

court judgments. *Id.* at 7a-10a. The court rejected petitioners' argument that the *Rooker-Feldman* doctrine did not apply on the theory that federal law deprived the state court of jurisdiction. *Id.* at 8a-9a. The court concluded that 12 U.S.C. 1821(j), which bars courts from awarding equitable relief against the FDIC, did not apply to the state court action because the FDIC was not a party to that action and the state court ordered relief only against petitioners. Pet. App. 9a. The court also concluded that 12 U.S.C. 1821(d)(13)(D) did not apply to the state court action. Pet. App. 9a-10a. Section 1821(d)(13)(D) requires the exhaustion of administrative remedies as a jurisdictional prerequisite to any action for payment from the assets of a depository institution for which the FDIC has been appointed receiver or any claim relating to any act or omission of such institution or the FDIC as receiver. The court of appeals held that "the statute does not reach assignees of assets once owned by the FDIC" as receiver but no longer owned by the FDIC. *Id.* at 10a.

The court of appeals also affirmed the dismissal of petitioners' claim that the FDIC had breached the assignment agreement. Pet. App. 10a-11a. The court concluded that, although the claim was not necessarily barred by the *Rooker-Feldman* doctrine, dismissal was nonetheless appropriate because the claim is moot. *Id.* at 10a. The court explained that petitioners could look only to the assets of the Capital Bank receivership to satisfy the claim, and the receivership had distributed all of those assets and been terminated in January 2001, more than three years before petitioners raised the claim. *Id.* at 10a-11a. Because "[n]o assets remain in the receivership to satisfy a late-filed claim," the court concluded that the claim is moot. *Id.* at 11a (citing deci-

sions from other courts of appeals reaching similar results).

ARGUMENT

The court of appeals correctly affirmed the dismissal of petitioners' suit. The court's decision does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Petitioners mistakenly contend (Pet. 11-18, 26-27) that two jurisdictional provisions, 12 U.S.C. 1821(d)(13)(D) and (j), which were enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 212(a), 103 Stat. 222, deprived the state court of jurisdiction over Valley View's claim seeking the release of the lien on the Balboa lot. As the court of appeals correctly held, the jurisdictional bars in FIRREA do not apply to suits, such as Valley View's, that are brought, not against the FDIC, but against an assignee of an asset formerly held by the FDIC. Pet. App. 9a-10a. That issue does not warrant further review.

By statutory mandate, the FDIC functions in two separate capacities—a receivership capacity and a corporate capacity. 12 U.S.C. 1821(a)(1)(A) and (c)(1); *FDIC v. Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991). Section 1821(j) limits the relief that a court may award against the FDIC in its receivership capacity. It provides, in pertinent part, that "no court may take any action * * * to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." 12 U.S.C. 1821(j). As the court of appeals explained (Pet. App. 9a), Section 1821(j) limits only a court's authority to award relief against the FDIC itself. A court does not take action "to restrain or affect the exercise" of the FDIC's powers unless it awards relief

against the FDIC. The state court did not do that here, because the FDIC was not a party to the litigation. *Ibid.* As the court of appeals observed, “[i]t was [petitioners], not the FDIC, who [were] ordered to reconvey the note and deed referencing the Balboa lot.” *Ibid.*

Section 1821(d)(13)(D) also did not deprive the state court of jurisdiction over Valley View’s claim. That provision states that, unless the FDIC’s administrative claims process has been exhausted, no court shall have jurisdiction over “(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.” As the court of appeals correctly concluded, Section 1821(d)(13)(D) applies only in an action against the FDIC. Pet. App. 10a. It does not apply in an action, such as Valley View’s state court suit, against a private party who owns an asset that was formerly held by an FDIC receivership, particularly when the receivership has since terminated. See *ibid.*

Section 1821(d)(13)(D) is designed to preserve the integrity of the administrative claims process established by FIRREA. It therefore “bars judicial review of any non-exhausted claim * * * which is ‘susceptible of resolution through the claims procedure.’” *Henderson v. Bank of New England*, 986 F.2d 319, 321 (9th Cir.) (quoting *Rosa v. RTC*, 938 F.2d 383, 394 (3d Cir.), cert. denied, 502 U.S. 981 (1991)), cert. denied, 510 U.S. 995 (1993). But Section 1821(d)(13)(D) does not apply to claims that are not susceptible of resolution through the administrative procedure, such as claims against a pri-

vate party who holds an asset that was once held by an FDIC receivership, particularly when the receivership has terminated. In that circumstance, there is no administrative claims procedure to exhaust, because that procedure governs only claims against the FDIC receivership. See 12 U.S.C. 1821(d)(3)-(6) and (10).¹

Petitioners argue (Pet. 15-16) that, if Congress intended to limit the application of Section 1821(d)(13)(D) to assets in the possession of the FDIC, it would have done so more explicitly, by modifying the statute's reference to "assets" with the phrase "in the possession of the receiver." But that limitation is inherent in the phrase "assets of any depository institution for which the Corporation has been appointed receiver." 12 U.S.C. 1821(d)(13)(D). Once the receivership has transferred an asset to a third party, the asset is no longer an "asset[] of [the] depository institution for which the Corporation has been appointed receiver." *Ibid.* For that reason, Congress expressly provided that Section

¹ Petitioners mistakenly suggest in passing (Pet. 18) that the administrative process applies only to claims based on the pre-closing actions of the failed institution and not to claims based on the conduct of the receiver itself. As almost every court of appeals that has addressed the issue has concluded, the administrative process applies to both categories of claims. See *McCarthy v. FDIC*, 348 F.3d 1075, 1080 (9th Cir. 2003); *FDIC v. Scott*, 125 F.3d 254, 259 (5th Cir. 1997); *Stamm v. Paul*, 121 F.3d 635, 642 (11th Cir. 1997); *Hudson United Bank v. Chase Manhattan Bank*, 43 F.3d 843, 851 (3d Cir. 1994); *Heno v. FDIC*, 20 F.3d 1204, 1208-1210 (1st Cir. 1994); *Office & Prof'l Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 66 n.7 (D.C. Cir. 1992); but see *Homeland Stores, Inc. v. RTC*, 17 F.3d 1269, 1272-1275 (10th Cir.), cert. denied, 513 U.S. 928 (1994). This case does not present an opportunity to resolve the disagreement among the courts of appeals on that issue, because the court below did not base its decision on a failure by petitioners to exhaust administrative remedies.

1821(d)(13)(D) also applies to assets that, although no longer owned by the receivership, are still owned by the FDIC in its corporate capacity. See *ibid.* (stating that the jurisdictional bar applies to suits regarding “assets which the Corporation may acquire from itself as such receiver”). If Section 1821(d)(13)(D) generally applied to assets that the receivership has assigned to others, there would have been no need to specify that the assets assigned to the FDIC in its corporate capacity are also covered. Accordingly, the court of appeals correctly held that Section 1821(d)(13)(D)’s jurisdictional bar does not apply to “assignees of assets once owned by the FDIC.” Pet. App. 10a.²

Petitioners have not identified any decision by another court of appeals that has addressed the question whether FIRREA’s jurisdictional limitations apply to suits against private party assignees of FDIC receivership assets, much less a decision that conflicts with the decision below. Because the issue has not arisen fre-

² Petitioners note (Pet. 18-19) that courts of appeals have allowed assignees of receivership assets to invoke some of the FDIC’s special defenses, such as the *D’Oench, Dukme* doctrine. See Pet. 18-19 (citing, e.g., *Newton v. Uniwest Fin. Corp.*, 967 F.2d 340, 347 (9th Cir. 1992), and *Porras v. Petro Plex Sav. Ass’n*, 903 F.2d 379, 381 (5th Cir. 1990)). Petitioners argue (Pet. 19) that FIRREA’s jurisdictional limitations should likewise apply to assignees. But even the cases that petitioners cite indicate that assignees do not receive the benefit of all of the FIRREA provisions that apply to the FDIC. See, e.g., *Cadle Co. v. 1007 Joint Venture*, 82 F.3d 102, 105 (5th Cir. 1996) (six-year statute of limitations does not apply to suit brought by assignee of note formerly owned by FDIC receivership when claim had not accrued before the FDIC assignment). Petitioners cite no case that has applied the jurisdictional limits in Sections 1821(j) and 1821(d)(13)(D) to private parties, and it would not be appropriate to do so for the reasons explained above.

quently and there is no conflict among the courts of appeals, this Court's review of the issue is not warranted.

2. Petitioners also contend (Pet. 20-24, 28-30) that the court of appeals erroneously dismissed their breach of contract claim against the FDIC receivership. The court of appeals correctly affirmed the dismissal of that claim, and its determination does not warrant further review.

Any claim against an FDIC receivership generally must be submitted to the receiver for determination by the date specified in the FDIC notice to creditors to present their claims, 12 U.S.C. 1821(d)(3)(B), or the claim "shall be disallowed and such disallowance shall be final," 12 U.S.C. 1821(d)(5)(C)(i). There is a limited exception for claims that could not have been filed before that date, but those claims still must be "filed in time to permit payment." 12 U.S.C. 1821(d)(5)(C)(ii)(II). Because the FDIC's liability for claims against a receivership is limited to the assets of the receivership, 12 U.S.C. 1821(i)(2); *Maher v. FDIC*, 441 F.3d 522, 525-526 (7th Cir. 2006), cert. denied, 127 S. Ct. 1357 (2007); *First Ind. Fed. Sav. Bank v. FDIC*, 964 F.2d 503, 507 (5th Cir. 1992), claims filed after the receivership has terminated and its assets have been distributed are not "filed in time to permit payment," 12 U.S.C. 1821(d)(5)(C)(ii)(II). Petitioners did not file their claim until more than three years after the Capital Bank receivership had distributed all the failed bank's assets and been terminated. Accordingly, petitioners' claim was "disallowed" by operation of law, 12 U.S.C. 1821(d)(5)(C)(i), and it was correctly dismissed.

Moreover, as the court of appeals observed, petitioners "may look only to the assets of the Capital Bank receivership to satisfy" their claim against the receiver-

ship, and “[n]o assets remain in the receivership to satisfy [petitioners’] late-filed claim.” Pet. App. 10a-11a (citing, *inter alia*, *Maher, supra*, and *First Ind. Sav. Bank, supra*). The court of appeals therefore concluded that petitioners’ alleged injury cannot be “redressed by a favorable judicial decision,” and their claim is moot. *Ibid.* As petitioners concede (Pet. 24), that conclusion accords with decisions of four other courts of appeals that have considered similar issues. See Pet. App. 10a-11a (citing cases). Because there is no conflict among the courts of appeals on the issue, this Court’s review is not warranted.

Relying on 12 U.S.C. 1821(d)(20) and now-repealed 12 U.S.C. 1821(a)(7)(C)(i) (2000), petitioners contend (Pet. 20-23) that their claim should not have been dismissed because it is an administrative expense of the receiver payable out of the FDIC’s Bank Insurance Fund. Petitioners did not raise that contention until they filed their reply brief in the court of appeals. The court of appeals did not address the issue, which was not timely raised under Ninth Circuit rules. See, e.g., *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (2003); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (1996). Accordingly, this Court also should not consider the issue. See *National Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459, 470 (1999) (Court does not ordinarily address issues not passed on below).

In any event, petitioners’ reliance on those provisions is mistaken. Section 1821(d)(20) provides that a “final” judgment for a receiver’s breach of a contract “shall be paid as an administrative expense of the receiver.” 12 U.S.C. 1821(d)(20). That provision classifies those judgments as administrative expenses to clarify the order of priority in which they should be paid when receiv-

ership assets are distributed. See, e.g., Cal. Fin. Code § 3119.5(a)(1) (West 1999).³ But the classification of a “final” judgment for breach of contract as an “administrative expense” does not override the statutory command that a claim (including one for breach of contract) “shall be disallowed” if it is submitted after the receivership has been terminated and its assets distributed. 12 U.S.C. 1821(d)(5)(C)(i).

Petitioners’ reliance on former 12 U.S.C. 1821(a)(7)(C)(i) (2000) is also misplaced. To begin with, petitioners inaccurately quote the provision as referencing the FDIC’s responsibilities as “receiver.” Pet. 21 (purporting to quote 12 U.S.C. 1821(a)(7)(C)(i) (2000)). The provision actually stated that “[a]ny personnel, administrative, or other overhead expenses of the Corporation shall be allocated—(i) fully to the Bank Insurance Fund, if the expense was incurred directly as a result of the Corporation’s responsibilities solely with respect to Bank Insurance Fund members.” 12 U.S.C. 1821(a)(7)(C)(i) (2000) (emphasis added). Section 1821(a)(7)(C)(i) was an accounting provision that directed how the Corporation’s overhead expenses should be allocated, for bookkeeping purposes, between the FDIC’s two insurance funds, the Bank Insurance Fund and the Savings Association Insurance Fund. The provision’s limited role is confirmed by the fact that Congress repealed the provision in 2006, when the two funds were merged. See Federal Deposit Insurance

³ The California statutory priority schedule governed the distribution of assets in the Capital Bank receivership because Capital Bank was chartered by the State of California. FIRREA, Pub. L. No. 101-73, § 212(a), 103 Stat. 242 (12 U.S.C. 1821(g)(4)); *Goldblatt v. FDIC*, 105 F.3d 1325, 1328, n.1 (9th Cir. 1997). Under that schedule, liquidation expenses, i.e. administrative expenses, of the receiver were paid first.

Reform Conforming Amendments of 2005, Pub. L. No. 109-173, § 8(a)(11)(C) and (b), 119 Stat. 3612, 3616. The provision did not alter the statutory command that “[t]he maximum liability of the Corporation, acting as receiver or in any other capacity, to any person having a claim against the receiver or [a failed financial institution] shall equal the amount such claimant would have received if the Corporation had liquidated the assets and liabilities of such institution.” 12 U.S.C. 1821(i)(2). As discussed above, petitioners received nothing (and were entitled to nothing) when the FDIC terminated the Capital Bank receivership and liquidated the assets and liabilities of the bank, because petitioners had not filed a timely claim. Nothing in now-repealed Section 1821(a)(7)(C)(i) changes that fact.

3. Petitioners also incorrectly argue (Pet. 24-26) that the state court decision reforming the FDIC Settlement Agreement constitutes an unconstitutional taking of the Balboa lien by the federal government. That claim was not included in petitioners’ complaint, and petitioners raised it for the first time in their petition for rehearing before the court of appeals. Accordingly, the court of appeals did not address the claim. See *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (court will not consider issues raised for the first time on appeal); *United States v. Lewis*, 787 F.2d 1318, 1323 n.6 (9th Cir. 1986) (court does not consider issues raised for the first time in a rehearing petition).

In any event, petitioners’ taking claim lacks merit. The state court decision could not have effected a taking by the federal government because neither the FDIC nor any other component of the federal government participated in the state court litigation or obtained any property interest as a result of the state court decision.

Nor did the FDIC appropriate any of petitioners' property or enact any regulations depriving them of their property at any other time. See generally *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-327 (2002) (a taking can occur by the appropriation of private property through direct governmental action or through governmental regulation).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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